Supreme Court, U.S.
FILED
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No. 94-1898

In The

# Supreme Court of the United States

October Term, 1995

JACK J. GRYNBERG,

*Petitioner,*

v.

HENRY KLEIN, GUR SHOMRON, AMIRAM GRYNBERG and DEFENDISK, LIMITED, an Israeli Corporation,

*Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

## REPLY BRIEF OF PETITIONER

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July 1995

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## I. THE APPLICABILITY OF THE *ERIE* DOCTRINE TO QUESTIONS OF APPELLATE JURISDICTION REMAINS UNDECIDED AND UNRESOLVED.

The lower federal courts need Supreme Court guidance as to whether in diversity cases a uniform standard of mootness applies in all instances, or the law of the forum supplies the rule of decision under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Without considering the *Erie* question or citing any authorities which do, Respondents simply assert that federal law governs appellate questions, and thus must prevail here (*See, e.g.*, Klein Brief in Opposition, Points II and III). That argument is too facile: the cases cited by Respondent Klein arose as federal questions, so state law could not have been in issue. *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977), addressed a Jones Act claim under 46 U.S.C. § 688, and *Deposit Guaranty Nat. Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980), concerned the National Bank Act, 12 U.S.C. §§ 85, 86.[1] Nevertheless, both are somewhat instructive here.

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[1] *Donovan* holds that accepting a remitted verdict, despite protest, bars appeal, *Id.* at 648-49. That point parallels Petitioner's argument that even under federal law Respondents' acceptance of the breach of fiduciary duty damages should bar their efforts to increase that award, and that the Tenth Circuit incorrectly disposed of the matter. *Donovan* makes passing reference to diversity litigation, in dicta, when the Court indicates it would not apply state law on a question extraneous to the issue here, *i.e.*, the *size* of verdicts. In *Deposit Guaranty*, this Court reinstated a claim because the plaintiffs "never accepted the tender or judgment as satisfaction of their substantive claims." *Id.* at 1173. Here, the Respondents did embrace the judgment, taking affirmative steps forcibly to collect the award.

*Donovan* and *Deposit Guaranty* each differentiate between the federal law's purview with respect to questions of justiciability on the one hand and matters of appellate procedure on the other. *Deposit Guaranty* refers to

> the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal.

*Deposit Guaranty*, 445 U.S. at 335. The former should at times yield to local law, for where "one is barred from recovery in the state court, he should likewise be barred in the federal court." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). In diversity cases, a federal court is "in effect, only another court of the State." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108 (1945). Consequently, remedies not accorded by state courts should not be available to those who have access to a federal forum solely by virtue of their diverse citizenship. *See, Angel v. Bullington*, 330 U.S. 183, 192 (1947). For example, if a state statute of limitations terminates a claim, the federal courts must respect that result because, "As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law." *Guaranty Trust Co.*, 326 U.S. at 110.

This Court has yet to decide whether rules governing mootness and the voluntary waiver of appellate rights in state courts deserve the same deference accorded other

precepts of state law. In Colorado courts, the local acceptance of benefits rule would bring this litigation to an end.[2]

Consequently, if the *Erie* doctrine imports a state's litigation-ending principles into federal court, the Tenth Circuit was without jurisdiction to proceed. Petitioner asks this court to grant certiorari to address that open question.

## II. RESPONDENTS DID NOT EXECUTE A "SEPARATE AND DIVISIBLE" PART OF THE JUDGMENT, AND THE CIRCUITS DISAGREE ON THE EFFECT OF EXECUTING A JUDGMENT ONE SEEKS TO APPEAL.

Respondents' arguments that one may accept the benefits of part of a judgment without jeopardizing his right to appeal a separate and divisible part, and that the acceptance of a tendered payment does not alone constitute an accord and satisfaction, rely on well-established but inapplicable rules. Respondents did not limit their collection efforts to a divisible part of the award, nor did

---

[2] The Shomron Respondents argue to the contrary, but not persuasively. The case on which they rely, *Stenback v. Front Range Financial Corp.*, 764 P.2d 380 (Colo.App. 1988), barred the judgment debtor's appeal of an adverse judgment because of his "conscious and voluntary" acquiescence in the judgment, even in the face of judicial compulsion. *Id.* at 383. Here Respondents, the judgment creditors, appealed a favorable verdict as to which they took voluntary collection efforts even before the court order of which they complain. If anything, *Stenback* emphasizes Colorado's policy of ending the appeals of parties who voluntarily accept a judgment.

they accept a tender. They executed on the whole of the judgment, including the part attributed to breach of fiduciary duty. Respondents thereby embraced not only the part they chose not to appeal, the contract damages, but also the part they challenged, the award for breach of fiduciary duty.

Moreover, the Tenth Circuit's opinion here does not rest on the "separate and divisible" rule. Respondents raised this same argument below, but the court never addressed the point, apparently recognizing that it had no application under the facts of the case.

Respondents' appeal challenged evidentiary rulings directly related to the breach of fiduciary duty judgment on which they executed as well as the trial judge's disposition of the punitive damages awarded for that breach. Those contentions negate Respondents' current assertion that the part of the judgment they embraced can be divorced from the part they challenged. The evidentiary rulings inextricably underlie the principal claim, and punitive damages do not constitute a claim separate and divisible from the compensatory verdict. *Lanier v. Sallas*, 777 F.2d 321, 325-26 (5th Cir. 1985); *see also, Arizona St. Carpenters Pension Tr. Fund v. Miller*, 938 F.2d 1038, 1040 (9th Cir. 1991); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1155 (3d Cir. 1990). Even the Eleventh Circuit case on which Respondents rely, *Fidelcor Mortgage Corp. v. Insurance Co. of North America*, 820 F.2d 367, 370 (11th Cir. 1987), recognized the inseparability of actual and exemplary damages, rejecting the very position Respondents now assert.

The question here is not whether the circuits agree on the rule that prevails when an appellant executes a part of a judgment separate and divisible from a part he appeals. Instead, the issue, not addressed by Respondents, is whether the circuits apply divergent and unreconciled rules about the consequences of executing on the same part of a judgment that one is appealing.

In *Fidelcor*, the Eleventh Circuit, applying the acceptance of benefits rule, dismissed an appeal because:

> It is well settled that when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, he waives his right to appeal from an otherwise adverse judgment.

820 F.2d at 370. The Tenth Circuit never considered whether the Respondents' efforts to collect the breach of fiduciary duty judgment constituted acceptance of the award. Instead the court relied exclusively on *United States v. Hougham*, 364 U.S. 310 (1960), to dispose of this case, implicitly concluding that *Hougham* supplies the exclusive rule for waiver of appellate rights in the federal courts.

The rule of *Hougham* does not salvage Respondents' appeal because the contractual elements essential to the resolution in *Hougham* are absent here and because, as demonstrated in the following section, Respondents' acts of consequence were indisputably voluntary. The judgment creditor in *Hougham* did not pursue execution; Respondents did. The judgment debtor in *Hougham* tendered payment, Petitioner did not. If *Erie* does not mandate the application of Colorado's acceptance of benefits

rule in this case, then *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866), not *Hougham*, articulates the governing federal rule.

By declining to recognize a purview for the acceptance of benefits rule, the Tenth Circuit Court of Appeals engendered irreconcilable conflict with the Eleventh Circuit. By ignoring *Dashiel*, the court turned its back on an established, if little known, Supreme Court decision. Certiorari should be granted to resolve the conflict and to determine *Dashiel*'s viability.

## III. RESPONDENTS VOLUNTARILY ACCEPTED THE BENEFITS OF THE BREACH OF FIDUCIARY DUTY JUDGMENT.

Respondents' contention that they accepted the benefits of the fiduciary duty judgment under compulsion misstates the facts of record and perverts the applicable legal principles. Respondents acted unilaterally and freely in depriving Petitioner of his property. *United States v. Dashiel*, 70 U.S. 268, 3 Wall. 688 (1866), establishes that the judgment debtor's loss of the property, not the judgment creditor's acquisition of it, extinguishes the debt. Indeed, in *Dashiel* this Court noted that "Where the goods seized are taken out of the possession of the debtor, and they are sufficient to satisfy the execution, . . . the debt is discharged" even if the creditor never receives the proceeds. *Id.* at 269.

The assertion, most succinctly stated at page 8 of the Shomron group's Brief, that "Respondents did not voluntarily pursue any legal measures to recover . . . the four dollars breach of fiduciary duty claim . . . " transparently

misrepresents the facts. The district court did not force Respondents to garnish Petitioner's accounts on both the contract and fiduciary awards, Respondents did so of their own accord on July 6 and 24, 1992, long before the September 2, 1992 Order that Respondents now claim compelled them to take the funds. (Appendix E, *infra.*) On July 21, 1992 and August 10, 1992, again well in advance of the Order in question, Respondents freely chose to move for judgment against the garnishees for enough of Petitioner's money to satisfy both the contract and fiduciary duty awards. [Aplee.Supp.App.Vol.I at 6-9, 5-15.][3] Their request was granted. They sought to withdraw those funds on August 18, 1992 and August 20, 1992, still before Petitioner asked the district court to intervene and order acknowledgement of satisfaction upon disbursement of the requested payments. [Aplee.Supp.App.Vol.I at 30-39.]

By the time the district judge ordered Respondents to file acknowledgements – the only coercive act to which Respondents can point – their incontrovertibly voluntary acts of garnishment, levy and execution had already deprived Petitioner of sufficient property to pay in full, with interest, both the contract and fiduciary duty judgments. Under *Dashiel's* rule, even as partially quoted by Respondents, (Shomron Brief at 8), the judgment was already extinguished before the judge ordered the filing of acknowledgements of satisfaction. Any remaining

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[3] Paragraph 1 of Respondents July 21, 1992 motion explicitly requests execution on $518,005, the entire judgment entered in Respondents' favor, including the breach of fiduciary duty award.

ambiguity or uncertainty dissolves when one considers the whole of *Dashiel's* rule, including the words omitted by Respondents' ellipsis: "When the property is lost to the debtor in consequence of the legal measures which the creditor has pursued, the debt . . . is gone *although the creditor may not have been paid.*" 70 U.S. at 269 (emphasis supplied).

Respondent Klein shows similar disregard for the record. He would have this Court believe that the trial court set aside the breach of fiduciary duty award.[4] It did not. The jury awarded each of the Respondents one dollar on their fiduciary duty claims, and the Court entered judgment accordingly. (Petition, Appendix A at A-10, Appendix B at B-2.) The crux of the issue here is that Respondents willingly executed the breach of fiduciary duty judgment simultaneously with their appeal of it.

These facts belie Respondents' denial that they voluntarily pursued legal means to collect the judgment, and their empty protestations should not interfere with this Court's decision whether the issues presented warrant review.

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[4] Klein's Brief in Opposition refers to "The District Court's Judgment N.O.V. as to the claim for breach of fiduciary duty," at page 4 and again at page 5. The only part of the Jury's verdict set aside by the district court pertained to exemplary damages for the tortious conduct, an aspect of the case not before this court. Hearing on Posttrial Motions, June 24, 1992 at 109 [Aplee.Supp. App.Vol.II at 333]; (*See also* Petition, Appendix A at A-8).

## IV. THIS CASE PRESENTS IMPORTANT QUESTIONS OF BROAD APPLICATION IN FEDERAL LITIGATION.

Whether federal law or state law applied by the federal courts in diversity cases articulates the governing formulation of the acceptance of benefits rule, this matter has general importance to litigants and courts in the federal system. The rule, whatever its terms and however established, affects the appellate rights and decisions of all judgment creditors unhappy with the size of their awards.

These litigants, who must weigh the benefits of a judgment already won against the uncertainties and prospects of appeal, need to know whether they may execute on the judgment while appealing it. The courts that entertain these cases need to know the limits of their jurisdiction. And both the courts and the parties need to know whether the determinative rule resides in state or federal law. Only this Court can definitively articulate the applicable principles.

Respectfully submitted,

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## APPENDIX E

## UNITED STATES DISTRICT COURT
## DISTRICT OF COLORADO

(C.R.C.P.No. 32) (Filed July 6, 1992)

Case No. ~~84-S-2429~~ 84-S-1593

**WRIT OF GARNISHMENT – JUDGMENT DEBTOR OTHER THAN NATURAL PERSON**

Gur Shomron, Amiram Grynberg and Defendisk, LTD., Plaintiff(s)

vs.

Jack J. Grynberg and Grynberg Petroleum Company Defendant(s)

Judgment Debtor's name, last known address, other identifying information: Grynberg Petroleum Company, 5000 South Quebec, Denver, Colorado 80237

| | | |
|---|---|---|
| 1. Original Amount of Judgment Entered 3/31/92 Amount after Judgment 6-29-92 (date) | | $ 518,005 |
| 2. Plus any Interest Due on Judgment ( * % per annum) | + | $ 434,493 (through 6/29/92) |
| 3. Taxable Costs (Including estimated cost of service of this Writ) | + | $ 240 |
| 4. Less any Amount Paid | - | $ -0- |
| 5. Principal Balance/Total Amount Due and Owing | = | $ 952,738 |

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of 6/29/92 .
(date)

Subscribed under oath before me on 29 June 1992

/s/ Joyce D. Alden-Sawyer

Notary Public or Deputy Clerk

My Commission Expires: 31 May 1996

* 8% 6/27/84 to 3/31/92
4.58% 4/1/92 to 6/29/92

Gur Shamron, Amiram Grynberg and Defendisk, LTD.
(Print Judgment Creditor's Name)

Address: Grynberg Engineers, 7 Haarad St., Ramat Hachayal, P.O. Box 43252, TEL-AVIV 7 C 61430

By: /s/ Patrick D. Vellone
Signature (Type Name, Title, Address and Phone)
VINTON, WALLER, SLIVKA & PANASCI
BY: Patrick D. Vellone
1600 Stout Street,
Suite 1100,
Denver, CO 80202
Dan Crupain, Esq.,
Crupain & Greenfield
225 Broadway,
New York, NY 10007
Attorney's for Plaintiffs

---

**WRIT OF GARNISHMENT**

**To The United States Marshal or** to the Sheriff of any Colorado County, or to any person over the age of 18 years who is not a party to this action:

You are directed to serve a copy of this Writ of Garnishment upon Norwest Bank-Denver, 1740 Broadway, Denver Colorado 80274 . Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your answers to the Judgment Creditor or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. YOUR FAILURE TO ANSWER THIS WRIT MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To hold pending court order any personal property owed to or owned by the Judgment Debtor and in your possession or control on the date and time this Writ was served upon you.

YOU ARE NOTIFIED:

a. This Writ applies to all personal property owed to or owned by the Judgment Debtor and in your possession or control as of the date and time this Writ was served upon you.

b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.

c. If you are ordered to pay funds to the Court, tender your check for the amount ordered PAYABLE TO THE CLERK OF THE U.S. DISTRICT COURT AT 1929 Stout St., Room C-145 Denver, CO 80294

**JAMES R. MANSPEAKER**
CLERK OF THE COURT

By: /s/ Debra Hansen
Deputy Clerk

(See Reverse Side)

Date: 6-30-92

**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLORADO**

(C.R.C.P.No. 29)

Case No. 84-S-2429 (84-S-1593)

**WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY**

Gur Shomron, Amiram Grynberg and Defendisk, Ltd.
Plaintiff(s)

vs.

Jack J. Grynberg and Grynberg Petroleum Company,
Defendant(s)

Judgment Debtor's name, last known address, other identifying information: Jack J. Grynberg, 4661 Dosa Drive, Cherry Hills Village, CO 80110

| | | |
|---|---|---|
| 1. Original Amount of Judgment Entered 6/29/92 (date) | | $ 518,004 |
| 2. Plus any Interest Due on Judgment ( * % per annum) | + | $ 437,329 (through 7/24/92) |
| 3. Taxable Costs (Including estimated cost of service of this Writ) | + | $ 1,400 |
| 4. Less any Amount Paid | - | $ -0- |
| 5. Principal Balance/Total Amount Due and Owing | = | $ 956,733 |

I affirm that I am authorized to act for the Judgment Creditor and this is a correct statement as of 7/24/92 .
(date)

Subscribed under oath before me on 24 July 1992

/s/ Joyce D. Alden-Sawyer

Notary Public or Deputy Clerk

My Commission Expires: 31 May 1996

Gur Shamron, Amiram Grynberg and Defendisk, LTD.
(Print Judgment Creditor's Name)

Address: Grynberg Engineers, 7 Haarad St., Ramad Hachayal, P.O. Box 43252, Tel-Aviv 7-C61430

By: /s/ Margaret M. McClellan for:
Signature (Type Name, Title, Address and Phone)
Patrick D. Vellone
VINTON, WALLER, SLIVKA & PANASCI
1600 Stout Street,
Suite 1100
Denver, CO 80202
(303) 534-4499
Dan Crupain,
Crupain & Greenfield
225 Broadway,
New York, NY 10007

* 8% 6/27/84 to 3/31/92
4.58% 4/1/92 to 7/24/92

## WRIT OF GARNISHMENT WITH NOTICE OF EXEMPTION AND PENDING LEVY

**To The United States Marshal or** to the Sheriff of any Colorado County, or to any person over the age of 18 years who is not a party to this action:

You are directed to serve a copy of this Writ of Garnishment upon Painewebber Incorporated. Garnishee, with proper return of service to be made to the Court.

TO THE GARNISHEE:

YOU ARE HEREBY SUMMONED AS GARNISHEE IN THIS ACTION AND ORDERED:

a. To answer the following questions under oath and file your answers with the Clerk of the Court (AND to mail a completed copy with your answers to the Judgment Creditor or attorney when a stamped envelope is attached) within 10 days following service of this Writ upon you. YOUR FAILURE TO ANSWER THIS WRIT WITH NOTICE MAY RESULT IN THE ENTRY OF A DEFAULT AGAINST YOU.

b. To hold pending court order any personal property (other than earnings) owed to or owned by the Judgment Debtor and in your possession or control on the date and time this Writ was served upon you.

YOU ARE NOTIFIED:

a. This Writ with Notice applies to all personal property (other than earnings) owed to or owned by the Judgment Debtor and in your possession or control as of the date and time this Writ was served upon you.

b. In no case may you withhold any personal property greater than the amount on Line 5 on the front of this Writ unless the personal property is incapable of being divided.

c. If you are ordered to pay funds to the Court, tender your check for the amount ordered PAYABLE TO THE CLERK OF THE U.S. DISTRICT COURT AT 1929 Stout St., Room C-145 Denver, CO 80294

**JAMES R. MANSPEAKER**
CLERK OF THE COURT

(See Reverse Side)

JAMES R. MANSPEAKER
By: /s/ Duane Darrald
Deputy Clerk

Date: 7/24/92